United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLEE

76-7307

In The

United States Court of Appeals

For The Second Circuit

IN THE MATTER OF THE PETITION

OF

THE TRUSTEES OF THE JOINT WELFARE FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS, LOCAL UNIONS 14, 14B, 15, 15A, 15C, 15D, AFL-CIO and THE TRUSTEES OF THE JOINT PENSION FUND OF THE INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNIONS 14, 14B, 15, 15A, 15C, 15D, AFL-CIO for the Appointment of a Special Master Pursuant to Title 29, U.S.C. Section 186 (c) (5).

TRUSTEES OF THE JOINT PENSION FUND INTERNATIONAL UNION OF OPERATING ENGINEERS LOCAL UNIONS 14, 14B, 15, 15A, 15C and 15D, AFL-CIO, other than Trustee Thomas Nolan, representing Local Union 14, 14B, I.U.O.E.,

Appellants,

THOMAS J. NOLAN, as Trustee, Representing Local Unions 14, 14B, International Union of Operating Engineers, AFL-CIO,

Appellee.

On Appeal from the United States District Court for the Southern District of New York

BRIEF FOR APPELLEE

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BRIEF FOR APPELLEE

ISSUES PRESENTED

I. Whether the division of the Joint Pension Fund pursuant to Section 10 of the Joint Pension Plan is equitable and whether the court abused its discretion in refusing to modify its prior order by deleting the Section 10 directive.

II. Whether the order appealed from is interlocutory warranting dismissal of the instant appeal under 28 U.S.C. §1291.

STATEMENT OF THE CASE

The Trustees of the Joint Pension Fund of the International Union of Operating Engineers (hereinafter "the Trustees"), other than Trustee Nolan who represents Locals 14 and 14B, appeal from an order of the United States District Court, Southern District of New York (Ward, J.) (302a),[1] entered May 25, 1976, which adopted the Special Master's recommendation (235a), and denied the motion of the Trustees to modify the District Court's order of May 21, 1975 (187a) by eliminating the direction therein that the plan of division of the Joint Pension Fund follow the procedures set forth in Section 10 of the Joint Pension Plan.

Course of Proceedings Below

On or about June 27, 1974, the Trustees of the Joint Welfare Fund and the Joint Pension Fund petitioned the court below for the appointment of a Special Master in accordance with §302(c)(5) of the Taft-Hartley Act, 29 U.S.C. §186(c)(5) (4a-20a). The Trustee representative of Local 14 moved to dismiss the petition on the ground that the court lacked jurisdiction over the subject matter and on the further ground that the Trustees failed to comply with the provisions of the Employee Retirement Income Security Act, 29 U.S.C. §§1101 *et*

1. References are to pages in the Joint Appendix, unless otherwise indicated.

seq. (hereinafter "ERISA" or "the Act") (76a-77a). The court denied Trustee Nolan's motion and appointed the Special Master (176a-182a, 187a-189a). No appeals were noticed from that order.

Some four months thereafter, the Trustees, other than Trustee Nolan, moved under Rule 61 F.R.C.P. to modify the order of May 21, 1975, to the extent of eliminating therefrom the direction that the Joint Pension Fund be divided pursuant to the procedures set forth in Section 10 of the Joint Pension Plan (190a-191a). Briefs were submitted on behalf of the moving Trustees and on behalf of Trustee Nolan for Local 14 (237a, 242a). The Special Master heard oral argument from both sides and submitted a recommendation, dated May 21, 1976, which recommended "that the order of May 21, 1975 remain unchanged" (235a, 244a). The court adopted the Special Master's recommendation (302a) and the moving Trustees appealed (303a-305a).

FACTS

The Welfare Fund and the Pension Fund for the International Union of Operating Engineers, Locals 14, 14B, 15, 15A, 15C, 15D have been maintained on a joint basis since 1950 and 1956, respectively (6a-8a). Recent political skirmishing between Local 14 and Local 15 has, however, resulted in the need to divide the Joint Funds on some type of an equitable basis (85a, 91a-95a, 164a-166a). Accordingly, at a Special Meeting of the Joint Funds held on June 11, 1974, a motion to terminate the Joint Funds under the respective termination provisions was unanimously passed by the Trustees (79a, 83a).

The Trustees' Meetings

The Trustees were unable to work out among themselves a division of the Joint Funds between Local 14 and Local 15 primarily because of fundamental differences in positions concerning the portions due the respective Locals (101a-102a,

177a). It was the position of the employer Trustees that, regardless of the respective positions of the union Trustees, they could not agree on anything short of the court deciding the issue (104a-105a). Given the enormity of the pension corpus, some $36,000,000 at the time of the commencement of the action (177a), and given the political problems surrounding the initial decision to separate the Joint Funds (91a-95a), there was a determined reluctance to function on the administration of the Joint Funds and this reluctance compounded the natural disagreement among the Locals themselves as to their respective shares.

The deadlock was evidenced in the later meetings of November 8, 1974 and January 2, 1975, where the Trustees were unable to even agree upon an impartial arbitrator to resolve the deadlock (85a-88a, 106a-109a). In fact, the only thing the Trustees could agree upon was to submit the matter to federal court under the impasse provision of Taft-Hartley (83a). It was only upon the occurrence of that contingency that the Trustees voted upon a substantive vehicle of dissolution, namely, Section 10 of the Pension Plan (72a-73a), the only provision in the trust documents dealing with the mechanics of termination (23a-42a, 43a-64a). Thus, the Trustees required that the approval of the termination of the trusts and the allocation of the Funds in accordance with Section 10 be submitted for the court's consideration (83a).

The Appointment of the Special Master

The lower court, in its decision dated March 6, 1975, denied Trustee Nolan and Local 14's motion to dismiss the petition and granted the petition to appoint a Special Master under Rule 53(b) F.R.C.P. The court recognized the fundamental differences of the Trustees in regard to their administration of the Joint Funds and the consequent deadlock (177a, 180a-181a). The court further held that the proposed division of the Funds is more nearly a transfer of assets within the meaning of §208, 29

U.S.C. §1058 (ERISA), than a termination pursuant to §§4041 *et seq.*, 29 U.S.C. §§1341 *et seq.* (179a-180a). Although the court felt that at that time the Act did not require the submission of any proposed plan to the Pension Benefit Guaranty Corporation (hereinafter "PBGC"), the court, for the protection of pensioners and participants in the Joint Funds, nevertheless directed "that the PBGC be given notice and an opportunity to comment, upon the appointment of a Special Master, and upon any plan which, after hearings and deliberation, he may propose" (181a).

At that time the court also directed that an order be settled on notice (182a). Counsel for the Trustees served and filed a proposed order (183a-186a). Counsel for Local 14 and Trustee Nolan served a counter-proposed order (187a-189a). The counter-proposed order contained a directive that dissolution of the Joint Pension Fund be effected pursuant to Section 10 of the Pension Plan (188a). Such directive was in conformity with the resolution adopted at the June 11, 1974 Special Meeting of the Trustees wherein the Trustees unanimously voted to dissolve the Joint Funds pursuant to Section 10 (255a).

At the time that the counter-proposed order was submitted to the court below, counsel for Local 14 advised the court, by letter dated March 24, 1975, why the Section 10 directive should be included in any such order (256a-257a). Copies of such letter, together with the exhibits referred to therein, were sent to all counsel (256a-259a), and, pursuant to the court's request, to the PBGC.

On May 21, 1975, Judge Ward signed the counter-proposed order (187a-189a). On May 27, 1975, counsel for Local 14 served the order with notice of entry on all the parties to this proceeding (251a). Counsel for the Trustees and Local 15 themselves served the same order on the PBGC and all other counsel on June 6, 1975 (251a).

The Motion to Modify the Prior Order

Despite the Trustees' failure to object to the counter-proposed order for the two months prior to its signing, and despite their failure to object to the court's order for a month subsequent to its entry, on or about September 25, 1975, the Trustees moved to modify the order under Rule 61 F.R.C.P. on the grounds that the Section 10 approach resulted in an inequitable method of distribution of the Joint Pension Fund (190a-192a). Justification for the delay in seeking to rectify this inequity was given as counsel for the Trustees' realization of the actuarial impact of the Section 10 approach for the first time at a meeting of counsel and actuaries at the office of the Special Master on July 11, 1975 (194a, 251a). It is not disputed, however, that the counsel for the Trustees had himself drafted these trust instruments and that his actuary had drafted Section 10 (251a). Moreover counsel for the Trustees was present at the June 1974 meeting when the Trustees voted on the use of Section 10 (251a). Yet as counsel for the Trustees he did not know or did not see the need to know the actuarial impact of Section 10 until such meeting was held.

It was the Trustees' contention that the methodology employed by Section 10 would result in the disenfranchisement of countless thousands of participants within the Joint Pension Fund (195a). Under the Section 10 approach the actuarial cost for each present pensioner would be computed (72a); then the actuarial cost for each person who is presently eligible to retire would be computed (72a). In the subject corpus, the accrued liabilities computed in these two categories would exceed the book value of the current assets and the process would end (247a). A division would be made on the basis of the first two categories. The Trustees argued that this disenfranchised the majority of participants in the Joint Pension Fund.

The Trustees further argued that Section 10 could not be used to separate the Joint Pension Fund into the Local 14 Pension Fund and the Local 15 Pension Fund since it is labeled

a "termination" provision and contemplates an actual pay-out to pensioners (195a-197a).

The Trustees failed, however, to consider the nature of pension funds within the building trades industry. These funds operate on the principle of "unfunded liabilities" (262a-264a, 252a-253a).[2] These funds cannot cover all liabilities. They are able to cover those pensioners who are making a present and immediate call on the funds and those, who, though not as of yet retired, can retire tomorrow and call on the funds for payment (263a). The other participants rely on future contributions and if the actuarial principles are sound there will be sufficient funding when these participants do actually draw on the fund (263a).

The Joint Pension Fund which is the subject of this appeal operates on the principle of "unfunded liabilities" (264a, 243a). Eligibility for the receipt of a pension from the Joint Fund is predicated upon the number of credits accumulated by a participant in the plan (262a). The operation of Section 10 will in no way affect these credits. Participants will have the same number of credits after the separation as before (262a). Moreover, if the present funding is able to cover only immediate liabilities, a method of dissolution which results in two funds which can cover only immediate liabilities can hardly be termed inequitable (262a-263a, 243a).

Section 10 can likewise be used as an accepted actuarial method for dividing a pension fund (261a). It is essentially a liabilities method which divides the corpus on the basis of immediate liabilities. There will be no payment to pensioners beyond the present benefits they receive. There will merely be a

2. The affidavits submitted on behalf of Trustee Nolan and Local 14 and included in the Joint Appendix are chronologically out of order. The affidavits of Richard L. O'Hara (221a) and Charles Maresca (229a) which follow the main moving papers were submitted in response to actuarial plans requested by the Special Master and submitted by the Trustees on October 22, 1975. The main affidavits in opposition to the motion can be found on pages 245a-270a of the Joint Appendix. The recommendation of the Special Master (235a) placed in the middle of all these papers chronologically should immediately precede the order appealed from.

percentage split between the two funds with each using its share as its new fund corpus (261a-262a).

On October 15, 1975, the Special Master heard arguments from both sides and demanded that the actuaries for the Trustees submit some figures that would support their contentions of inequity. On October 22, 1975, counsel for the Trustees forwarded copies of the various plans to the Special Master and the parties involved.[3]

The first proffered method was a contribution method (222a). The second method suggested was a method of dissolution of the Funds based on the total present value of liabilities for all persons covered by the Joint Pension Plan (223a, 230a).

With respect to the contribution method, in a Fund that has existed since 1956, the actuary takes contribution figures from 1971 through 1973 of active participants (222a). The method, however, only honored future service credits. It totally ignored past service credits (232a). It ignored all participants who might have retired in the previous fifteen years and any participants who for any reason were inactive during the three base years (232a). It in effect ignored the vast majority of pensioners who are actually drawing on the Fund (232a). The resultant split was 74-26 in Local 15's favor (231a).

The Trustees themselves labeled the second method more equitable (232a). This resulted in a 65-35 split in Local 15's favor. However, to do so it had to arbitrarily change many of the assumptions upon which the present Fund is based, a questionable actuarial practice (230a-231a, 266a-267a, 243a-244a). In both methods, moreover, there was a mysterious disappearance of ten (10) percent of the membership of Local 14 (223a, 232a).

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3. The Trustees have apparently opted not to include this letter and enclosures in the Joint Appendix.

The Recommendation of the Special Master

The recommendation of the Special Master, after considering the argument and the various plans submitted by the Trustees, found that the Section 10 methodology was equitable in light of the nature of the Joint Fund as one based on "unfounded liabilities" (243a). The Special Master found, further, that the use of Section 10 was directed by the Trustees at a meeting at which all interested parties were represented (242a).

The test for determining equity in the present situation was formulated as follows:

> "If, as a result of the division of a joint plan into two continuing separate plans, the members of each plan find themselves as well secured with respect to their promised benefits as they were before the division, then equity has been done." (242a).

The Special Master recognized that under the Joint Plan "there never were sufficient assets on hand to fund the accrued benefits of all participants at any given time" (243a), and that it was the pensioners and those members eligible for immediate retirement who had "first call" on the assets of the Joint Fund (243a).

Accordingly, the Special Master found that

> "Allocation of the available assets to these two categories exhausts the funds on hand. If Section 10 is applied the funds will be allocated according to the same priorities. The members of the two new plans will have the same security for their benefits after the division as they did before it. This appears to be an equitable result." (243a).

The Special Master was not impressed with the plans submitted by the Trustees nor with their arbitrary change of assumptions (243a-244a).

The court below adopted the recommendation of the Special Master "to continue the process of determining an equitable allocation of the Joint Fund following the procedures contained in Section 10 of the Joint Pension Plan" (302a).

For the purpose of clarification, it should be noted that the Trustees in this proceeding, other than Trustee Nolan, are represented by William J. Corcoran, Esq., of the firm of Corcoran and Brady. Robert D. Brady, Esq., of the same firm, represents Local 15. The Trustees have suggested that the Special Master was confused as to who was seeking relief herein (Appellants' Brief, p. 23). Despite the occasion presented for such confusion, a reading of the Special Master's recommendation dispels any such notion.

It should also be noted that the PBGC has been apprised of all the proceedings had herein and has not indicated a desire to intervene.

ARGUMENT

Point I

The division of the Joint Pension Fund pursuant to Section 10 of the Joint Pension Plan is equitable in all respects and the court below did not abuse its discretion in refusing to modify its prior order by deleting the Section 10 directive.

The Trustees on appeal once again argue that the use of the Section 10 approach results in the disenfranchisement of all participants in the Joint Pension Plan who do not fit into the first two categories of Section 10 (Appellants' Brief, pp. 17, 22, 26-28, 32-33). The Trustees further argue that Section 10 cannot be used as a vehicle to divide the Joint Pension Plan because it is labeled a "termination" provision (Appellants' Brief, Point II).

The Trustees still refuse to recognize that the present Joint Pension Fund operates on the principle of "unfunded liabilities" (252a-253a, 262a-264a, 243a). This means that at any time in the operation of the Fund there are basically just enough assets to cover vested accrued liabilities, those present obligations emanating from categories (1) and (2) of Section 10. Those participants who are not as of yet entitled to payment will be funded for the most part through future contributions. Thus, it is very misleading to unequivocally state that the operation of Section 10 will have the effect of "disenfranchising" participants in the plan. An equitable split of a fund which is geared to cover only immediate obligations, will inevitably result in two funds of similar limited funding. This says nothing about the equity of the plan used to achieve such separation (see O'Hara Aff., 252a-253a, Maresca Aff. 264a-265a).

The Special Master recognized the nature of the funding of the Joint Fund and saw through the Trustees' attempt to set up a smokescreen of "disenfranchisement" (243a). In doing so the Special Master adopted a test to determine equity in the situation presented by the case at bar. The Special Master held that if, after the division of the Fund, the members are in essentially the same position as before the division, that is equity (242a). In the present case, because the present funding of the Joint Pension Fund is allocated to the first two categories of Section 10, division on the basis of these two categories will provide the members of the plans with the same security which they had before the separation (243a). Since pension credits of each of the members will remain intact in the new plans, both with respect to credits and with respect to funding, the members will essentially be in the same position.

This same test has been codified under ERISA. Under §208 of the Act, 29 U.S.C.A. §1058, it is provided:

> "A pension plan may not merge or consolidate with, or transfer its assets or liabilities to, any other plan after September 2, 1974, unless each

> participant in the plan would (if the plan then terminated) receive a benefit immediately after the merger, consolidation, or transfer which is equal to or greater than the benefit he would have been entitled to receive immediately before the merger, consolidation, or transfer (if the plan had then terminated). This paragraph shall apply in the case of a multiemployer plan only to the extent determined by the Pension Benefit Guaranty Corporation."

While the court below held that ERISA would not apply to the present corpus because its applicable provisions were not in effect at the time of the institution of this action, it did state that if ERISA did govern this dissolution, §208 would be controlling (179a-181a). In determining a question of an equitable split of a pension fund, the Congressional intent of what would be equitable in precisely the present situation would be helpful to a court in determining what is patently inequitable. The Trustees, however, have not even addressed themselves to the propriety of the test formulated by the Special Master.

With respect to the utility of Section 10 as a vehicle for the separation of the Joint Fund, the Trustees make a rather semantical argument. The mere fact that Section 10 is labeled "termination" is immaterial with respect to its use as a viable instrument to divide the Funds. It is an accepted actuarial formula for dividing or separating a particular fund (246a, 261a-262a). It is immaterial that Section 10 can also be used in the case of termination.

Section 10 is a liability method much like the plans of dissolution submitted by the actuaries for the Trustees (239a-240a). The difference, of course, is that Section 10 emphasizes the vested accrued liabilities of the Joint Fund as opposed to future liabilities. Since the Joint Plan is funded to meet only these immediate liabilities it becomes an especially useful tool in dividing the present corpus. Moreover, the Trustees themselves voted on the use of Section 10 (242a).

Analogy once again to §208 of the Act is helpful. With regard to a transfer of assets from one plan to another the comparable benefits of each member are measured in terms of the hypothetical situation of termination of both the old and the new plan. Under the Joint Pension Plan, only categories (1) and (2) of Section 10 would receive a share of the corpus upon termination. Using Section 10 as a method of dissolution, there will be no diminution of the value of the benefits each pensioner or participant in these two categories receives. The same cannot be said for any other method which divides the corpus on any other basis than immediate liabilities. In addition, the new plans will be able to carry over each participant's pension credits to be funded by future contributions. Thus, recourse to the termination provisions with respect to a plan not completely funded may become imperative in determining the propriety of any plan of dissolution in the future.

With respect to the Trustees' reference to Section 203 of the Act, 29 U.S.C. §1053 (Appellants' Brief, Point III), again the Trustees are referring to future liabilities which will be funded by future contributions. Under §203(a) of the Act, the liability will not be payable until the participant reaches normal retirement age. The present Joint Fund cannot presently fund all future liabilities, either normally anticipated liabilities or liabilities newly acquired by virtue of ERISA.

The lower court, moreover, has determined that ERISA does not apply to the instant separation. With respect to the new Funds which are to survive the split of the Joint Fund, to the extent ERISA imposes more liberal vesting requirements, it compensates for that fact by providing more stringent funding requirements (§§302 *et seq.* of the Act, 29 U.S.C. §§1082 *et seq.*).

It must also be noted that under §203 of the Act the Plan Administrator has his option of three vesting schedules. The liabilities undertaken by the new plans do not result from the Section 10 split. The plans themselves, to a certain extent, have a say under the Act as to which future liabilities will be

undertaken. Section 10 will merely place the new Funds in as close a proximity to present liabilities as the Joint Fund stood.

If the Trustees are concerned about litigation, the diminution of vested accrued benefits which they are attempting to effect by a shift away from the present liabilities approach of Section 10 will do nothing to diminish that expectation (§208 of the Act).

The Trustees moved the lower court pursuant to Rule 61 F.R.C.P. Rule 61 is a codification of the harmless error rule and would have no application with respect to relief from a final judgment or interlocutory order of the nature sought by the Trustees.

A lower court, however, has plenary power over its interlocutory orders. *John Simmons Co. v. Grier Bros.*, 258 U.S. 82 (1922); *Waco-Porter Corporation v. Tubular Structures Corporation of America,* 222 F. Supp. 332 (S.D. Cal. 1963). Accordingly, modification may be had anytime before final judgment so long as it is consonant with equity to do so and due diligence has been employed. *John Simmons Co. v. Grier Bros., supra.*

Trustee Nolan has heretofore shown that the Trustees' charge of inequity was nothing more than a smokescreen to shield what is merely disappointment in the actuarial and mathematical results of Section 10's application. In fact, the Special Master held that Section 10 was more equitable than any of the plans of dissolution proffered by the Trustees (243a).

Not only have the Trustees failed to show that the lower court abused its discretion in not rectifying what it termed an inequitable situation, but the facts underlying the dispute evidence a total lack of due diligence on the Trustees' part. The record reveals a situation where counsel for the Trustees sat with an order containing a provision which he deemed inequitable and inconsistent with the very decision upon which it was based

for a period of two months prior to its execution and then after execution of this same order sat silent over another month (247a-250a).

To justify his delay, counsel for the Trustees suggests that he was surprised when he discovered the actuarial impact of the formula espoused in Section 10 (194a, 251a). However, counsel at all times relevant had immediate access to the actuaries who in fact drafted Section 10 as well as the actuaries who were working with the Martin E. Segal Company in preparing the refined active census data for presentation to the Special Master (249a, 251a). Moreover, counsel to the Trustees was present at the June 11, 1974 meeting when these same Trustees voted unanimously to dissolve the Joint Pension Fund pursuant to Section 10 (251a).

In light of the broad powers inherent in the court to revise its orders, a sojourn into the applicability of any particular federal rule is unwarranted in the case of a motion for relief from an interlocutory order. A different situation obtains, however, when relief is sought from a final order. The lower courts have less power to revise final decisions. *Waco-Porter Corp. v. Tubular Structures Corp. of America, supra.* Recourse must be had to Rule 60(b) F.R.C.P.

To maintain this appeal, the Trustees must satisfy the requirements of finality. 28 U.S.C. §1291. Since the order appealed from involves a denial of a motion to modify a prior order, its finality is dependent upon the question of the finality of the prior order. The Trustees seem to suggest that the lower court's order of May 25, 1976 is the only final order (Appellants' Brief, p. 17). The denial of a motion to modify an interlocutory order, however, as a matter of common sense, cannot be deemed a final order especially where, as here, the basis of finality is premised on the ministerial nature of the reference (Appellants' Brief, Point I). The finality of the order sought to be modified is controlling.

The mode of relief from a final order is dictated under the Federal Rules and the limitations therein cannot be circumvented by moving under an inappropriate rule. Rule 60(b) F.R.C.P. If the Trustees assert that the order appealed from is final, their only avenue of relief is under Rule 60(b), not Rule 61.

The Trustees' reluctance to use Rule 60(b) is understandable. Rule 60(b) is not a substitute for appeal. *Ackermann v. United States,* 340 U.S. 193 (1950); *Wojton v. Marks,* 344 F.2d 222 (7th Cir. 1965). The Trustees, herein, elected not to appeal from the original order of May 21, 1975 appointing the Special Master.

In that regard, the Trustees' reliance on *Maryland Tuna Corp. v. M.S. Benares* (429 F.2d 307 (2d Cir. 1970)), for the proposition that the notice of appeal from the May 25, 1976 order can be treated as a notice of appeal from the prior order, is misplaced. As this Court stated in *Maryland Tuna, supra,* a timely motion for reargument tolls the time of filing an appeal from the final judgment which under Fed. R. App. P. 4(a) does not run anew until entry of an order denying reargument.

Conversely, under Rule 60(b), it is expressly stated that "[a] motion under this subdivision (b) does not affect the finality of a judgment or suspend its operation." Moreover, the present motion to modify was made almost four months after entry of the order appointing the Special Master, at a time when the time to appeal from that order had long passed.

In addition, the Trustees would have difficulty satisfying the prerequisites of Rule 60(b). The most appropriate cubbyhole appears to be Rule 60(b)(5) which provides relief from a final judgment where "it is no longer equitable that the judgment should have prospective application." This rule, however, is based on some change in conditions that makes continued enforcement inequitable and does not render a judgment subject to impeachment for conditions that existed at its making. *United States v. Swift & Co.,* 286 U.S. 106 (1932); *Schildhaus v. Moe,*

335 F.2d 529 (2d Cir. 1964). The Trustees' alleged surprise at the actuarial results of Section 10 does not constitute a change of condition sufficient to satisfy Rule 60(b)(5).

Moreover, the catchall provision of Rule 60(b)(6) in addition to being unavailable where an election not to appeal is made *(Whiteleather v. United States,* 264 F.2d 861 (6th Cir. 1959)), is applicable only upon a showing of extraordinary circumstances in unusual and exceptional cases and only on the basis of some reason other than those specified in the preceding clauses. *Federal Deposit Insurance Corporation v. Alker,* 234 F.2d 113 (3rd Cir. 1956).

The Trustees, consequently, find themselves in a quandary. If the order appealed from is interlocutory, the Trustees are able to avoid the pitfalls of Rule 60(b), but their appeal will be dismissed. If, on the other hand the order appealed from is final, it is because the order appointing the Special Master if final, and relief can only come through Rule 60(b), and the Trustees' election not to appeal, *inter alia*, precludes that avenue of relief.

Point II

The order appealed from is interlocutory requiring dismissal of the instant appeal.

At the outset it should be stated that the instant appeal is not the type of interlocutory order which falls within the "collateral order doctrine" of *Cohen v. Beneficial Industrial Loan Corp.* (337 U.S. 541 (1949)) for the simple reason that the splitting of the Joint Pension Fund is not "collateral to" or "independent of" the main cause but rather, along with the splitting of the Joint Welfare Fund, is the reason itself for the action (Appellants' Brief, pp. 22-23).

Moreover, the "death knell" doctrine described in *Williams v. Mumford* (511 F.2d 363 (D. of C. Cir.1975)), a case in which the appeal from an order refusing to certify a class was dismissed

as interlocutory, is applicable in class actions where the refusal to certify the class will effectively prevent the claim from being adjudicated because of a lack of financial impetus (Appellants' Brief, p. 21). The present case involves, in part, a $36,000,000 Joint Pension Fund.

The primary basis upon which the Trustees assert finality is the alleged ministerial duty the Special Master will exercise with respect to the Joint Pension Fund (Appellants' Brief, pp. 14-17, 20-21). No mention is made of the Special Master's duty with respect to the Joint Welfare Fund. The Trustees do, however, inform the court of the limited assets which presently remain in that Fund (Appellants' Brief, p. 9).

It is well settled that an order of reference to a Master is generally interlocutory and not appealable unless the reference involved nothing more than a mere ministerial purpose. *Deckert v. Independence Shares Corporation,* 311 U.S. 282 (1940); *Latta v. Kilbourn,* 150 U.S. 524 (1893).

In the case of *Beebe v. Russell* (19 How. (U.S.) 283, 15 L.Ed 668 (1856)), a reference was made to a Master with certain clearly defined directions as to the execution of his functions with respect to the taking of accounts of rents and profits on the subject parcels. The court held that:

> "When a decree finally decides and disposes of the whole merits of the cause, and reserves no further questions or directions for the future judgment of the court, so that it will not be necessary to bring the cause again before the court for its final decision, it is a final decree. It is true, a decree may be final, although it directs a reference to a master, if all the consequential directions depending upon the result of the master's report are contained in the decree, so that no further decree of the court will be necessary, upon the confirmation of the report,

> *to give the parties the entire and full benefit of the previous decision of the court.* (*Mills v. Hoag,* 7 Paige, 18)." 19 How. (U.S.) at 285.

With particular reference to the instant appeal, the court, in *Beebe v. Russell, supra,* went on to note that

> ". . . the reference of a case to a master, to take an account upon evidence, and from the examination of the parties, and to make or not to make allowances affecting the rights of the parties, and to report his results to the court, is not a final decree; because his report is subject to exceptions from either side, which must be brought to the notice of the court before it can be available. It can only be made so by the courts overruling the exceptions, or by an order confirming the report, with a final decree for its appropriation and payment." 19 How. (U.S.) at 286.

The Special Master herein was appointed under Rule 53(b) F.R.C.P. Under Rule 53(e)(2), in an action to be tried without a jury, the court shall accept the Master's findings of fact unless *clearly erroneous.* Although the District Court is to accept the Master's findings of fact unless clearly erroneous, the Master's report is advisory. It is the District Court that makes an adjudication upon the facts and law and enters judgment. *In re Mifflin Chem. Corp.,* 123 F.2d 311 (3rd Cir. 1941).

The Trustee for Local 14 concedes that the results under Section 10 will be a mathematical certainty. The assumptions upon which the Joint Pension Fund operates are fixed. All that need be done is the computation of the reserves of the pensioners and participants in categories (1) and (2) of Section 10. An allocation of corpus based on such computation will then be made. However, the results will be findings of fact on the part of the Special Master which the District Court is required to

review under Rule 53(e)(2). Conceivably, there could be clearly erroneous findings of fact. The matter is complex. Likewise the valuation of the assets of the Joint Pension Fund has not been finally determined by the Special Master and reported to the court below.

The Special Master, moreover, has not as of yet been given the opportunity to function on the Joint Welfare Fund. While it must be brought to this Court's attention that with respect to the Joint Welfare Fund the parties have informally agreed on an equal split, the matter has not yet been put before the Special Master for a determination of fairness nor have such findings with regard to the Welfare Plan been submitted to the court for its review. Rule 53(e)(2) F.R.C.P.

With respect to both Joint Funds the parties may file written objections. Rule 53(e)(2). In light of the court's power under Rule 53(e)(2), the lower court's directive with regard to Section 10 cannot be construed to imbue the Special Master with only ministerial functions under the reasoning of *Beebe v. Russell, supra.*

Nor can the prior orders entered herein be said to finally determine the cause herein (Appellants' Brief, pp. 20-21).

CONCLUSION

Based on the foregoing, it is respectfully submitted that the order of the lower court be affirmed in all respects or alternatively that the present appeal be dismissed, together with costs and such other and further relief as the Court deems just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

Re: 76-7307
Trustees of the Joint Pension Fund
Intl Union of Operating Eng. v. Nolan

STATE OF NEW JERSEY :
: ss.:
COUNTY OF MIDDLESEX :

I, Muriel Mayer, being duly sworn according to law, and being over the age of 21 upon my oath depose and say that: I am retained by the attorney for the above named Appellee.

That on the 28th day of October , 1976, I served the within

Brief for Appellee

in the matter of Trustees of the Joint Pension Fund Intl. Union of Operating Engineers v. Nolan

upon

(See attached List)

by depositing two (2) true copies of the same securely enclosed in a post-paid wrapper, in an official depository maintained by the United States Government.

Muriel Mayer
Muriel Mayer

Sworn to and subscribed
before me this 28th day
of October 1976.

Lorraine Leotta
A Notary Public of the
State of New Jersey.

LORRAINE LEOTTA
NOTARY PUBLIC OF NEW JERSEY
My Commission Expires April 13, 1977

Trustees of the Joint Pension Fund Int. Union of
Operating Engineers v. Nolan

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